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No. 86-

IN THE

Supreme Court of the United States

October Term, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
Appellants,
UNITED STATES OF AMERICA,
Intervenor,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether Congress acted unconstitutionally when it amended Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, to permit religious employers to hire only members of their own faith, regardless of the nature of the employment activity, thus making it unnecessary for federal courts to decide whether particular employment activities of religions are in fact religious?

2. Whether, when an Act of Congress is declared unconstitutional, a court may award damages against an employer who relied upon the plain language of the statute in setting conditions of employment?

PARTIES

In addition to the parties set forth in the caption, the following are parties to this action:

1. *Plaintiffs*

Judy Bawden	Arthur Frank Mayson
April Joyce Riding	Ruth Arriola
Deniece Kanon	Shelleen Adamson

Ralph L. Whitaker has no interest in this appeal because the District Court determined that he was properly discharged from his employment. No final judgment against Mr. Whitaker has been entered.

The plaintiffs purported to bring their claims on behalf of a class. No motion to certify a class has been filed.

2. *Defendants*

The Corporation of the President of The Church of Jesus Christ of Latter-day Saints

STATEMENT REQUIRED BY RULE 28.1

The Corporation of the President of The Church of Jesus Christ of Latter-day Saints is a corporation sole organized under the laws of Utah and incorporates the office of the presiding spiritual leader, the President, of The Church of Jesus Christ of Latter-day Saints. *See* Utah Code Ann. §§ 16-7-1 to 12. The Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints incorporates the office of the Presiding Bishop, who is another ecclesiastical leader of the Church. As corporations sole, the appellants do not issue stock and have no parent corporations. They are "affiliated" with each other because of the relationship between Church ecclesiastical offices. The corporations sole are not profit-making entities, but they have wholly-owned subsidiaries. The Corporation of the President has substantial ownership in the following corporations:

Heber J. Grant & Company
Zions Cooperative Mercantile Institute

STATEMENT PURSUANT TO RULES 28.4(b) AND 28.4(c)

Pursuant to Rule 28.4(b), the Appellants state that the United States District Court for the District of Utah has certified this matter pursuant to 28 U.S.C. § 2403(a) to the Attorney General of the United States. The United States has intervened as a party and has filed a notice of appeal.

Pursuant to Rule 28.4(c), the Appellants state that the United States District Court for the District of Utah has certified this matter pursuant to 28 U.S.C. § 2403(b) to the Attorney General of the State of Utah, who has declined to intervene as a party or to participate as amicus curiae.

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THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The District Court's Memorandum Decisions and Orders dated January 11, 1984 (App. A, 1a-82a) and September 18, 1985 (App. C, 88a-122a) are reported *sub nom. Amos* v. *Corporation of Presiding Bishop* at 584 F.Supp 791 and at 618 F.Supp 1013.

JURISDICTION

The Final Judgment of the District Court was entered on May 16, 1986. Notices of Appeal were timely filed in the District Court by the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints

("CPB") and the Corporation of the President of The Church of Jesus Christ of Latter-day Saints ("COP") on June 9, 1986 (App. 130a), and by the United States on June 12, 1986. This Court has jurisdiction of this direct appeal under 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment of the United States Constitution provides in pertinent part that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....

Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides that it shall be unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Section 702 of the Civil Rights Act of 1964 (unamended), formerly codified at 42 U.S.C. § 2000e-1, provided:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any state, or to a religious corpora-

> tion, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities.

The 1972 amendment to Section 702, codified at 42 U.S.C. § 2000e-1, provides:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any state, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Excerpts from the Utah Code Annotated are set forth at App. 132a.

STATEMENT OF THE CASE

The appellants seek review of a judgment of the United States District Court for the District of Utah, which has invalidated a key provision of Title VII of the Civil Rights Act of 1964. As originally enacted in 1964, Section 702 of that Act provided that religious employers may restrict their employment to "individuals of a particular religion to perform work connected with ... [their] religious activities...." In 1972 Congress deleted the word "religious," thereby broadening the exemption to permit religious employers to hire "individuals of a particular religion" (*i.e.*, members of their own faith) regardless of whether the work to be done could be categorized as "religious."

The District Court has held the 1972 amendment unconstitutional as applied to employment activities which

are not "religious." Thus, it has effectively held that the qualification in the 1964 version was constitutionally required.

1. The appellants administer certain programs of The Church of Jesus Christ of Latter-day Saints ("Church").[1] Among the activities operated by the Church are Deseret Gymnasium ("Deseret") and Beehive Clothing Mills ("Beehive"). Deseret is an unincorporated, Church-owned, tax-exempt and subsidized facility which was founded by the Church to provide its members with wholesome, Church-supervised exercise and recreation at facilities where the Church's moral and health standards are observed. Deseret makes its facilities available to the public and to charitable groups and therapy patients. Beehive is an unincorporated, Church-owned, tax-exempt and subsidized operation which manufactures required religious garments and ceremonial clothing used in the Church's temples.

The Church has a policy of employing only Church members who are eligible for temple recommends.[2] The appellees are former employees who failed to meet the recommend requirement.

2. The original plaintiffs, former employees at Deseret and Beehive, filed their complaint on April 4, 1982.[3] They

[1]The Church is also known as the LDS or Mormon Church. The appellant COP serves as the primary employing entity for the departments and divisions of the Church. The CPB holds title to a number of Church facilities, including those where the appellees were employed.

[2]The temple recommend signifies that its possessor is eligible to enter the Church's temples, where certain sacred ceremonies are performed. Since temple recommends are issued only to members who observe Church religious standards, they afford an administratively convenient means of identifying those who qualify for Church employment.

[3]The case was brought as a class action but has never been certified as such.

challenge the constitutionality of Section 702's exemption for religious employers and a similar exemption granted by a Utah statute similar to Title VII.[4]

The appellants moved to dismiss the complaint, admitting that the appellees had been terminated solely because of their ineligibility for temple recommends and relying on Section 702's exemption. In a decision issued January 11, 1984, the District Court concluded that, as amended in 1972, Section 702 applies to all church employment,

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[4]In comparing the Utah statute with Title VII the District Court observed that "Section 34-35-6 of the Utah Code similarly prohibits an employer from engaging in a number of discriminatory employment practices. Among the various prohibitions, Utah has made it unlawful:

> For an employer to refuse to hire, to discharge, to promote, demote, or to discriminate in matters of compensation against any person otherwise qualified, because of race, color, sex, age, if the individual is 40 years of age or older, religion, ancestry, national origin, or handicap.

Utah Code Ann. § 34-35-6(1)(a) (Supp. 1983)." 594 F.Supp. at 797, App. 6a-7a.

The District Court further observed that "Utah has exempted religious entities from the coverage of its antidiscrimination act by excluding them from the definition of employer:

> 'Employer' means the state or any political subdivision or board, commission, department, institution or school district thereof, and every person employing 25 or more employees within the state; but does not include religious organizations or associations, religious corporations sole, nor any corporation or association constituting a wholly owned subsidiary or agency of any religious corporation or association or religious corporation sole, a bona fide private membership club (other than a labor organization)."

Id. at 798, App. 7a-8a, *quoting* Utah Code Ann. § 34-35-5, App. 132a.

religious and non-religious[5] (594 F.Supp. at 805, App. 24a), but held the 1972 amendment to be an unconstitutional establishment of religion as applied to employment in non-religious activities.[6] *Id.* at 804-26, App. 20a-70a. The District Court developed its own test to determine whether a given activity is or is not religious. *Id.* at 799, App. 10a-11a.

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[5]The District Court's interpretation of the 1972 amendment as granting religious employers an unqualified exemption to hire their own members for any purpose is clearly correct, as borne out not only by the change in the statutory language, but also by the legislative history. The Conference Committee explained that the amendment expanded the exemption for religious organizations with respect to religious discrimination "in all their activities instead of the present limitation to religious activity." *Legislative History of the Equal Employment Opportunity Act of 1972 ("1972 History")*, Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92nd Cong., 2nd Sess. 1814 (joint explanatory statement of conference managers). And Representative Erlenborn, one of the House managers of the conference bill, characterized the provision before the full House as "a broad exemption for anyone employed by the religious institutions rather than only those people who might be used in religious work per se," (*1972 History* at 1858-59), adding that such a religious institution was to be exempt even if engaged in a "profit-making venture". The amendment's chief opponent, Senator Williams, also confirmed its scope just before the Senate approved it by voice vote. *1972 History* at 1665-66 (February 21, 1972).

[6]In *King's Garden, Inc.* v. *Federal Communications Commission*, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974), the Court of Appeals for the District of Columbia Circuit stated in dictum that, "The 1972 exemption is of very doubtful constitutionality," (*id.* at 53), but that issue was not before the court in that case, which involved solely a construction of the FCC's employment discrimination regulations. *See also Feldstein* v. *Christian Science Monitor*, 555 F.Supp. 974 (D. Mass. 1983). *Collins* v. *Porter Memorial Hospital*, Civ. No. 86-A-1229, now pending in the United States District Court for the District of Colorado, raises the same issue as the one presented by this appeal. (A nurse formerly employed in a hospital operated by the Seventh Day Adventist Church claims that she was dismissed because she is not a Seventh Day Adventist.)

Applying this distinction between religious and non-religious employment, the court held Section 702 to be invalid as applied to employees at Deseret, whose activities the court classified as non-religious.[7] 594 F.Supp. at 799-802, App. 9a-18a. The District Court concluded that it needed more information in order to make the determinative finding whether the activity at Beehive was religious or non-religious. 594 F.Supp. at 802-03, App. 16a-20a.

The appellees did not seek immediate entry of judgment in favor of Arthur Frank Mayson, the only plaintiff formerly employed at Deseret. Instead, they amended the complaint to add a new plaintiff, Ralph L. Whitaker, who had been employed at Deseret Industries ("Industries"). Industries is an unincorporated, tax-exempt and subsidized component of the Church's welfare program. 618 F.Supp. at 1022, App. 104a-107a. Industries hires and trains certain unemployed, handicapped and retarded members of the Church by, *inter alia*, refurbishing and selling used items. *Id.* The appellees sought and the District Court ordered extensive discovery concerning the world-wide manufacture and distribution of religious garments and the nature, religious bases, personnel policies, and job descriptions at Deseret, Beehive, and Industries.

On September 18, 1985, acting on the appellees' motion for summary judgment, the District Court reaffirmed its holding that Section 702 cannot constitutionally be ap-

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[7]With regard to the Utah law, the District Court stated:

> In discussing the plaintiffs' claims of unconstitutionality, the court will only discuss Section 702 because the determination regarding the federal law applies with equal force to the state exemption as it relates to the facts of this case.

594 F.Supp. at 798, App. 8a.

plied to Mr. Mayson's job at Deseret. 618 F.Supp. at 1027 App. 116a. The District Court denied summary judgment with respect to Beehive, stating that it needed still further information about any past hiring of non-members or ineligible members and about foreign garment manufacture and supply. *Id.* at 1020-22, App. 101a-105a. The District Court also entered summary judgment in appellants' favor with regard to Industries, which it concluded was sufficiently religious to pass its test of what is a religious activity. *Id.* at 1027, App. 116a. The District Court awarded back wages, fringe benefits, retirement contributions, and reinstatement to Mr. Mayson. *Id.* at 1027-29, App. 116a-120a.

On February 5, 1986 the District Court vacated its judgment and certified the case to the Attorney General of the United States and to the Utah Attorney General pursuant to 28 U.S.C. § 2403. The United States intervened and filed a brief urging the District Court to reverse its earlier holdings. The Utah Attorney General declined to intervene or participate as amicus curiae. On May 16, 1986, the District Court entered an order and judgment reaffirming its earlier holdings and granting final judgment for Mr. Mayson. App. 87a. This appeal followed.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

In 1972, following eight years of experience with Title VII, Congress amended Section 702 to make it unnecessary for federal courts, in deciding employment discrimination cases, to distinguish between religious and non-religious activities. The District Court has held this amendment unconstitutional and has created a new test that requires broad scrutiny of the tenets, rituals and administrative practices of religions for the purpose of determining what is and what is not "religious." The decision, which falls squarely within this Court's direct appellate

jurisdiction, will affect most, if not all, of the nation's churches. The questions presented are substantial and must be reviewed by this Court.

1. The District Court should have resolved this case without ever reaching the Establishment Clause issue. Neither the three-pronged test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), nor any other Establishment Clause test was triggered by Congress' amendment of Section 702. If Congress had not enacted any prohibition against employment discrimination in interstate commerce, this suit could never have been brought. The appellees' complaint, then, is properly addressed to Congress for its refusal to go as far as the appellees would have liked.

It is well settled that in any given area, Congress can exercise less than the full extent of its power to regulate interstate commerce. *See Mabee* v. *White Plains Pub. Co.*, 327 U.S. 178 (1946); *Currin* v. *Wallace*, 306 U.S. 1 (1939); *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). Section 702 is an integral part of Congress' total statutory effort to prevent employment discrimination based on race, color, sex, national origin, or religion. If, as occurred here, Congress chooses to prohibit some religion-based employment discrimination, but stops short of what it could arguably have prohibited under the Constitution, Congress does not thereby exceed its constitutional powers.

Prior to 1964, there was no federal employment discrimination law, and Congress was under no constitutional obligation to enact one. Congress could have exempted religious employers entirely from Title VII, just as it exempted itself. 42 U.S.C. § 2000e-16; *see also, Davis* v. *Passman*, 442 U.S. 228 (1979). Instead, Congress gave religious employers a partial exemption. The 1964 exemption permitted them to hire their own members in their religious activities, and in 1972, Congress enlarged the ex-

emption by eliminating the requirement that a religious purpose of the employment be proven.

The net effect of the 1972 amendment was to alleviate Establishment Clause problems.[8] The 1965 version of Section 702, which required federal courts to entangle themselves in such questions as (1) what are the employing church's beliefs and practices? (2) do they qualify as genuinely religious? and (3) what is the likelihood that the means chosen by the church will in fact achieve its religious objectives (here, contributing to the Church's objective of caring for the needs of its own members)?[9]

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[8]When it enacted Title VII, Congress had three options concerning religious preferences by religious employers. Two are represented by the 1964 and 1972 versions of Section 702. The third would have been to eliminate Section 702 altogether. The alternative eventually selected is the only one that does not raise serious constitutional questions. As noted in the text, the 1972 amendment alleviated entanglement problems that arose out of the 1964 version. And the constitutional problems resulting from the complete elimination of Section 702 would have been even more severe, because that would have left churches with no discretion to favor their own members for any position, including those that are central to the achievement of religious objectives. Even the District Court recognized that an exemption for "religious" activities is not only permissible, but required by the Free Exercise Clause. 594 F.Supp. at 818, App. 53a-54a.

[9]The District Court concluded that Industries was sufficiently religious because of the Church's doctrinal welfare objectives. The District Court ignored the fact that the Church's welfare and religious objectives far exceed the scope of Industries and include caring for all the needs of its members. The Church is certainly entitled to conclude (as it has concluded) that one effective way to provide for its members' needs is to keep them employed. *See* App. 109a-110a. It would also seem obvious that the Church may rely on its own resources as an employer for those purposes. Whether the objective of providing for its members' needs is sufficiently religious and whether using the Church's employment resources for the benefit of its own members furthers its objectives are judgments that are more appropriately made by the appellants than by a court. In any event, Congress has decided that these are the kinds of issues into which courts should not intrude.

Whether federal courts can constitutionally decide such issues is highly doubtful. *NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. 490, 501-04 (1979). It is well established, for example, that a federal court must not become involved in resolving church property disputes where the very act of rendering judgment would require the court to pass on matters related to church doctrine. *Presbyterian Church* v. *Hull,* 393 U.S. 440 (1969). Similarly, churches have the constitutional right "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952); *see also Serbian Eastern Orthodox Diocese* v. *Milivojevich,* 426 U.S. 696 (1976).[10]

Fortunately, courts need not decide such issues. In 1972, Congress took judges out of that business, so that the serious constitutional questions presented by the 1964 Act need not be reached. Surely it fell within Congress' power to make the change that made it unnecessary for courts to decide which of a church's programs are religious and which are not.

Viewing the 1972 amendment as lessening statutory civil rights protection otherwise available does not change the result. In *Crawford* v. *Board of Educ. of City of Los Angeles,* 458 U.S. 527 (1982), this Court held that the Constitution is not violated when a state first requires mandatory busing to achieve racial balance in the public schools — though under no federal constitutional obliga-

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[10]In an analogous context, federal criminal cases cannot be pursued where they would necessarily require decisions concerning the validity, truthfulness or propriety of a church's practices or beliefs. *United States* v. *Ballard,* 322 U.S. 78 (1944). *Cf. Ohio Civil Rights Commission* v. *Dayton Christian Schools, Inc.,* 106 S.Ct. 2718 (1986) (Stevens, J., concurring).

tion to do so — and then later rescinds that obligation through amendment to its state constitution.[11] Here, as in *Crawford,* the Constitution does not preclude the appropriate governmental policymakers from exercising less than the total measure of anti-discrimination authority arguably available to them or from establishing an initial threshold of anti-discrimination protection and then receding from that threshold.

In short, First Amendment values were strengthened, not infringed, by the 1972 amendment, which was a sensible congressional effort to avoid constitutional problems.[12] While this Court has the ultimate responsibility to interpret the Constitution, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), members of Congress also have a duty to uphold its principles. Efforts by Congress to tailor its lawmaking efforts to relieve constitutional concerns that Congress itself has indentified are entitled to deference. *United States* v. *Nixon*, 418 U.S. 683, 703 (1974); *see also, Patsy* v. *Board of Regents of State of Florida,* 457 U.S. 496, 504 (1982).

The District Court, however, denied Congress any discretion whatsoever in this area where constitutional concerns must be balanced. It held that while an exemption as to "religious" activities was required by the Free Exercise Clause, any expansion beyond that bare

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[11]California's state constitution had earlier been interpreted to prohibit *de facto* segregation as well as *de jure* (that is, the California constitution prohibited any desegregation condition regardless of the cause). California voters later amended their constitution essentially to conform to the federal requirements.

[12]Congress' amendment preserved not only Establishment Clause values but also Free Exercise values, such as the right of church members to reserve for themselves and their leaders decisions concerning what their religious objectives will be and how they can best achieve those objectives.

minimum was forbidden by the Establishment Clause.

2a. Assuming the applicability of the Establishment Clause, the District Court erred in its wooden application of the three-part test derived from *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971).

The relevant First Amendment issue is whether there is an establishment of religion. Obviously, inquiries into the purpose of the statutory scheme, its effects, and its resulting entanglements between church and state can be helpful in determining whether the constitutional prohibition has been violated. But, as recent decisions of this Court have made clear, the *Lemon* test is not a ritualistic checklist.[13] It is, rather, a guide to assist in determining whether, in any particular case, government has established a religion. In cases where other more helpful indicia are available, this Court has decided Establishment Clause challenges without reference to the *Lemon* test. *Marsh* v. *Chambers,* 463 U.S. 783 (1983); *Larson* v. *Valente,* 456 U.S. 228 (1982).[14]

The reasons that the *Lemon* test is singularly inappropriate here are not identical to the prevailing considerations in *Marsh* or *Larson*, but they are equally compelling.

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[13]"These tests 'must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired.' " *School Dist. of City of Grand Rapids* v. *Ball,* 105 S.Ct. 3216, 3222 (1985), *quoting in part, Meek* v. *Pittenger,* 421 U.S. 349, 359 (1975).

[14]In *Marsh*, this Court held that a state legislature's practice of opening each session with prayer did not violate Establishment Clause principles. In *Larson*, this Court struck down a state statute which required reporting and registration of those religions which solicited more than 50% of their funds from non-members. In neither case did the Court apply the *Lemon* test.

As at least one member of this Court has recognized, it makes little sense to seek a purely secular purpose and effect in laws designed to accommodate religion, since such laws are religion-conscious by nature. *See Wallace* v. *Jaffree,* 105 S.Ct. 2479, 2504 (1985) (O'Connor, J., concurring).

Even more important here, however, is the constitutional concern of church/state entanglement. It is a different kind of entanglement from that which the Court has considered in the parochial school aid cases, the birthplace of the *Lemon* test. The entanglement problem here is a judicial entanglement. The District Court has effectively held that the 1964 version of Section 702 was the only constitutionally acceptable one, and has thereby imported as a First Amendment *requirement* the very deficiencies in the 1964 version that made it constitutionally suspect. Applying the *Lemon* test in all its rigidity and adding a new three-step test of its own, the District Court has examined three Church programs to determine whether they are sufficiently religious. And with what results? For Title VII purposes, it is sufficiently religious for the Church to assist its unemployed, handicapped and retarded members, but not to operate a gymnasium in accord with the Church's health and moral standards. Whether the manufacture of required religious garments is sufficiently religious awaits further District Court analysis of both foreign and domestic Church activities.

To determine whether an activity is "religious" in a judge's eyes, the District Court has applied a complex test requiring examination of the Church's administration, rituals and tenets. 594 F.Supp. at 799, App. 10a-11a. Under the extensive case-by-case inquiry the District Court prescribed, no religious organization could be certain ahead of time of its exposure to Title VII liability for hiring its own believers. Inevitably, churches will be forced to err on the side of caution and admit non-believers into ac-

tivities with substantially religious elements. A church could never be certain that it would not have to hire individuals strongly opposed to its teachings.

Congress recognized and solved this very problem when it enacted the 1972 amendment. During the Senate debate, the amendment's sponsor, Senator Ervin, stated, citing Justice Douglas:

> It is impossible to separate the religious and non-religious aspects of a religious corporation.

118 Cong. Rec. at 1973 (Feb. 1, 1972). This Court likewise has recognized, in the context of a free exercise claim, that whether an activity or belief is "religious" or not "is not to turn upon a judicial perception of the particular beliefs or practice in question .... Courts are not arbiters of scriptural interpretation." *Thomas* v. *Review Board of Indiana Employment Security Division,* 450 U.S. 707, 714, 716 (1981).

First Amendment values are not only not promoted, but actually violated by a checklist approach in a case such as this. Assuming *arguendo* that Section 702 may have some effects that advance religion, the First Amendment's Establishment Clause values would be seriously endangered by holding the 1972 amendment unconstitutional for that reason alone. The Establishment Clause problems of serious dimension are not purpose problems or effect problems; they are entanglement problems. They are problems that result not from the 1972 amendment, but from the law that would have remained in place if Congress had enacted no amendment. As stated by Senator Ervin:

> ...this amendment is to take the political hands of Caesar off of the institutions of God, where they have no place to be.

118 Cong. Rec. 4503, *quoted at* 594 F.Supp. at 809, App. 32a.

2b. Even assuming the applicability of the *Lemon* test, the District Court's judgment must be reversed. The District Court held that "there was a valid legislative purpose" behind the amendment to Section 702 (594 F.Supp. at 812, App. 40a), and that it need not reach the entanglement issue because of its conclusion that the "effect of the exemption of religious organizations from Title VII for religious discrimination in secular, non-religious activities is to advance religion...." *Id.* at 828, App. 75a.

As this Court held in *Thomas, supra,* any "benefit" to religion from an exemption like that in Section 702 "manifests no more than the tension between the two Religious Clauses...", 450 U.S. at 719. That description also fits the 1972 amendment, which for that reason cannot be said to advance religion.

The District Court's conclusion concerning a proper congressional purpose is clearly correct. And in this particular case, given the background of Section 702, the holding concerning the purpose prong of the *Lemon* test should have led to favorable rulings with respect to effect and entanglement. The statutory enactment at issue is the 1972 amendment. The only relevant *effect* of that amendment was to take the federal courts out of the business of determining which church programs are sufficiently religious, and return that task to the churches themselves. Since both the purpose and effect of the amendment were to *relieve* entanglement between church and state, it is difficult to see how there could be any serious entanglement problem. By contrast, the District Court has entangled itself at the very heart of religious administration, tenet and ritual, as demonstrated by its own broad request for discovery. 594 F.Supp. at 803, App. 18a-19a.

3. The appellants acted in reliance upon an Act of Congress in managing the Church's affairs. Nevertheless, the District Court has awarded back wages, other economic

damages, and reinstatement to Mr. Mayson. Had the appellants acted in reliance on a ruling by the EEOC rather than the plain language of the statute, no such sanctions could have been imposed. 42 U.S.C. § 2000e-12(b); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975). This Court has determined that damage awards are not mandatory in civil rights cases, *Carey* v. *Piphus,* 435 U.S. 247 (1978), but it has not had occasion to examine the propriety of such an award against an employer that has squarely relied on the clear provisions of the congressional statute. Whether such an award is proper under these circumstances is a novel and significant question that merits full consideration by this Court.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction and schedule this case for briefing and oral argument.

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Respectfully submitted,

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